



October 6, 1999

Ms. Lisa Aguilar
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78711-2548

OR99-2839

Dear Ms. Aguilar:

You ask whether certain information is subject to required public disclosure under the, Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 127833.

The City of Corpus Christi (the "city") received a request for 1) the complete investigative file of the city's investigation of allegations made against the requestor's client; 2) all tape-recorded and written statements given during the investigation; 3) the activity records of two named employees; 4) the personnel files of four named employees; and 5) a copy of the city's civil service board rules and regulations, the city's code of ethics, the city's policies, and the city's sexual harassment policy. You inform us that the city released the fifth requested item. Based on section 552.101 of the Government Code, you seek to withhold from the requestor items one, two and, in part, four. You state that the city is seeking clarification from the requestor about the third requested item. Additionally, you seek to withhold from disclosure items one and two based on section 552.103 of the Government Code.

Section 552.103(a) of the Government Code¹ reads in part as follows:

(a) Information is excepted from [required public disclosure] if it is information:

¹While the Seventy-sixth Legislature amended section 552.103, a request for an attorney general decision under section 552.301 of the Government Code that is made before the effective date of that amendment, September 1, 1999, is covered by the law in effect on the date the request was made. Act of May 25, 1999, 76th Leg., R.S., S.B. 1951, §§6, 36.

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997), *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You contend that the requested information relates to an employee's appeal of his one day suspension to the city's civil service board. This appeal, you argue, should be considered litigation for purposes of section 552.103. This office has determined that a contested case under the Administrative Procedure Act (the "APA"), Government Code chapter 2001, constitutes "litigation." See Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). The city's civil service hearings are not subject to the APA, but to the city's civil service board rules and regulations. Accordingly, we conclude that the city has not established that the requested information relates to pending or reasonably anticipated litigation. Therefore, items one and two of the request may not be withheld under section 552.103.

You raise section 552.101 for the investigative file, the witness statements and certain information in the requested personnel files. Section 552.101 of the Government Code excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *id.*

The investigative file, witness statements, and portions of the personnel files pertain to investigations of allegations of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

You assert that exhibits C and D, disciplinary letters, provide an adequate summary of the investigation. We have marked information for public release that, coupled with exhibits C and D, adequately summarizes the investigation so as to serve the public interest in this situation. Based on *Ellen*, the city must withhold the information documenting the witness statements as well as the tape recorded witness statements. However, we find that the public interest in the statement of the alleged harassers outweighs any privacy interest they may have in that information. Therefore, the city may not withhold the statements of the alleged harassers. In addition, since the identities of the victim and witnesses to the alleged sexual harassment are protected by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation*, the name of the individuals must be redacted before any information may be released to the public. The personnel file information includes private financial information excepted from disclosure under section 552.101. See Open Records Decision No. 600 (1992). We have marked the documents accordingly.

The submitted records also include information that may be confidential under section 552.117 of the Government Code, and therefore, this specific information, depending on the specific circumstances, may not be released. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Therefore, if the employee has elected to not allow public access to this information in accordance with the procedures of section 552.024 of the Government Code, the city must withhold this information from required public disclosure pursuant to section 552.117. We have marked a sample of that

kind of information that must be withheld if the employee made the election not to allow public access to the information.

An employee's social security may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act on the basis of that federal provision. We caution, however, that section 552.353 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, the submitted information includes information excepted from disclosure under section 552.130 of the Government. Section 552.130 of the Government Code provides as follows

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

We have marked the documents accordingly.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in cursive script that reads "Kay Hastings".

Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/nc

Ref.: ID# 127833

Encl. Submitted documents

cc: Mr. Robert Zamora
Attorney at Law
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